Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

DAYTON SCOTT LISTER,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE WEST VIRGINIA
SUPREME COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

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QUESTION PRESENTED

Whether the Sixth Amendment guarantee to a trial by an impartial jury is violated where a juror is verbally threatened by unknown individuals the night before closing arguments, the threat is communicated to the entire jury panel, and, after denial of a Motion for Mistrial, the jury panel deliberates on both the guilt and sentencing phases of a capital case.

PARTIES TO THE PROCEEDINGS

Case styled *State of West Virginia v. Dayton Scott Lister*, Marion County, West Virginia, Case No. 05-F-90. West Virginia Supreme Court Case No. 070358.

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IN THE SUPREME COURT
OF THE UNITED STATES

NO. _____

DAYTON SCOTT LISTER,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dayton Scott Lister, respectfully requests that a writ of certiorari be issued to review the judgment of the State of West Virginia in this case.

OPINION BELOW

The opinion of the West Virginia Supreme Court of Appeals is unpublished and is reproduced in Appendix A to this Petition.

STATEMENT OF JURISDICTION

The West Virginia Supreme Court of Appeals denied Mr. Lister's timely petition for appeal on June 5, 2007. Appendix A. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America.

Amendment 5:

> "Criminal actions-Provisions concerning-Due process of law and just compensation clauses.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation/'

Amendment 6:

> "Rights of the accused.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner charged in a single count Indictment with First Degree Murder involving a drive-by shooting in Marion County, West Virginia, Case No. 05-F-90 subsequently West Virginia Supreme Court Case No. 070358. Petitioner was found guilty of First Degree Murder after a jury trial on April 28, 2006, in the State of West Virginia. At the sentencing phase the same jury panel returned a recommendation of no mercy mandating life without the possibility of parole.

A Petition for Appeal was timely filed and subsequently denied by a 3-2 vote. See Appendix A. The majority offered no substantive basis for its summary denial save that The West Virginia Supreme Court has "only" been reversed once (now twice) in recent years on First Degree Murder cases. See *Youngblood v. West Virginia*, __ U. S. __, 126 S. Ct. 2188, 165 L. Ed. 2d 269 (2006) and *Flippo v. W. Va.*, 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999).

The position that "only" two (2) First Degree Murder cases have been remanded by the United States Supreme Court in recent years is a spurious argument and does not warrant further comment. The denial of Petitioner's mistrial motion is a denial of his constitutional rights to a fair and impartial jury panel.

The relevant facts that support the constitutional issue of a fair and impartial jury panel are as follows and must be viewed in the context of the jury trial as a whole. On or about Thursday, April 27,2006, a juror after the afternoon break passed a note to the Trial Court that he recognized one of the defense witnesses who recently testified as a social acquaintance at music clubs. The juror, upon questioning by the Trial Court, unequivocally stated that he still could sit fairly and impartially at said proceedings.[1] Nevertheless, the

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[1] THE COURT: I have a note from the Bailiff who advises me that Juror Number 2, Mr. Banks, informed her that he and the witness "Bumper" ran around together, but he didn't know him by that name. I'm going to call him up and ask him - basically ask him to classify what he meant by "ran round together" and so forth, and then I'll decide what we need to do.

MR. WILSON: All right

THE COURT: Juror Number 2, would you come forward, (whereupon, Juror Number 2, Benjamin Banks, approached the bench, and the proceedings continued out of the hearing of the other jurors as follows:)

THE COURT: First of all, Mr. Banks let me explain this is not your fault. I very much appreciate you giving this information to the Bailiff. This is the exact right thing to do. I'm sure that they maybe didn't refer to him as "Bumper" when they were going through the names of the list of witnesses and that's what you knew him by. The Bailiff said that you said you and he ran around together.

JUROR BANKS: I've hung around with him a few times. Not real close, but I know who he is.

THE COURT: Would that cause you to favor or disfavor his evidence for his side of the case.

JUROR BANKS: No.

Trial Court dismissed the juror, over defense objection, and replaced him with Alternate No. 1. Later that same day, at the second afternoon break, after the testimony of the two (2) defense mental health experts, the Trial Court again received a note from a juror advising that a juror had expressed an opinion. The Court called the juror to the bench and inquired if, in fact, she had expressed that she did not "believe it would be first degree murder". TR at 861. The juror indicated that she had expressed an opinion (immediately after the hearing the defense mental health experts) and that likewise other jurors had expressed opinions as well. TR at 861. The Court conducted no further inquiry but summarily dismissed the juror and

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THE COURT: Okay. Stand over there for a minute please, (whereupon, Juror Banks stepped away from the bench, and the proceedings were resumed out of the hearing of all jurors as follows:)

THE COURT: In this situation, if it were the State's witness, I would ask defense counsel whether they wanted to disqualify him. I will give you the same option.

MR. WILSON: Could you give me just a second?

THE COURT: Sure.

(Whereupon, there was a discussion held off the record between Mr. Wilson and Ms. Hawkins.)

MR. WILSON: Your Honor, the State would move to disqualify the juror.

MR. ZIMAROWSKI: I would oppose that. There's no basis. He's answered the questions properly. He's been here for three and a half (3 *1/2)* days.

THE COURT: Overrule the objection. I'll - I'm going to excuse him.

TR at 770-772.

replaced her with Alternate No. 2, over defense counsel objection.[2] The Trial Court made no inquiry into the other opinions expressed. Moreover the juror who reported the incident obviously held an opinion at odds with the questioned juror. No inquiry was made. The State presented their mental health witness and all parties rested.

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[2] THE COURT: Ms. Tennant, would you come up please? (Whereupon, Juror Number 6, Eileen Tennant, approached the bench, and the proceedings continued out of the hearing of the jury as follows:)

THE COURT: It's been reported by one (1) of the members of the jury that you expressed an opinion as to what kind of verdict -

JUROR TENNANT: We've all expressed opinions.

THE COURT: Did you express an opinion about what kind of verdict you -

JUROR TENNANT: Express an opinion in what way?

THE COURT: Did you say that there was no way the State would get a first degree conviction.

JUROR TENNANT: I didn't say the State. I did not say that.

THE COURT: Okay. What did you say?

JUROR TENNANT: I said I don't believe that it would be first degree murder.

THE COURT: Okay, you're excused, ma'am.

JUROR TENNANT: Thank you.

MR. ZIMAROWSKI: Your Honor, we voice our objection to the dismissal of the juror.

THE COURT: Objection's noted. That's all.

TR at 860-861.

On Friday, April 28, 2006, the Trial Court received a third message from a juror via the Baliff. Upon approaching the bench the juror advised that while at a convenience store the evening before she was in line with her child and heard someone say to the effect "there's one of those bitch jurors if we take a few of those out, Scoot will be free". "I was afraid for my son". TR at 905. The Trial Court, unlike the previous juror inquiry, asked whether the juror could sit fairly and impartially; she indicated in the affirmative.[3]

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[3] JUROR LARRY: After I left here yesterday, I stopped at the Diary Mart, and my son and I were - my son was in the car, and we had the windows down because it was hot. I just went in the Dairy Mart for a few minutes. It was crowded, and there were a lot of cars in the parking lot. I was in line, and there were a lot of people that were lined up behind me. I had my hands full. Behind me heard someone say, "There's one of those bitch jurors." It was a male voice. I did not turn around. I did not look. I did not want them to know I heard what they said. I paid for my stuff quickly, and as I was paying, I heard him say, "If we take a few of those out, Scoot will go free." I did not turn around. I was afraid for my son. I didn't want them - I didn't want to acknowledge that I heard them. I took off and I left. I got in my car and I left. That's all.

THE COURT: Okay, let me ask you this: Do you feel that you can continue to sit on this jury and render a fair and impartial verdict?

JUROR LARRY: Oh, absolutely.

THE COURT: Do you think that would affect your deliberations in any manner whatsoever?

JUROR LARRY: No. No, not at all.

THE COURT: Do you want to ask her any questions?

MR. WILSON: No, sir

THE COURT: Mr. Zimarowski.

MR. ZIMAROWSKI: Are you telling this Court that you have no bias against the defendant or in favor of the State because you were a subject of that kind of a verbal assault?

JUROR LARRY: No. I don't feel that way at all. I mean, people were - it could have been anybody, don't know who it was. No, I did not feel -

MR. ZIMAROWSKI: You don't –

JUROR LARRY: No, I don't.

MR. ZIMAROWSKI: You aren't going to blame Mr. Lister, his family, his friends for that?

JUROR LARRY: I'm sure it wasn't him behind me.

MR. ZIMAROWSKI: It obviously wasn't him.

JUROR LARRY: No. No. No. I did not see them. It was just a comment that could have been made by anybody

MR. ZIMAROWSKI: Okay

THE COURT: Okay. You may have a seat.

(Whereupon, Juror Shannon Larry resumed to her seat in the jury box.)

THE COURT: The record reflect that I will reserve an objection to the defense for my refusal to declare a mistrial and to refuse - my refusal to excuse the juror, which would require me declaring a mistrial. And my reason basically is: 1) This woman was very, very sincere when she said it would not affect her at all; Secondly, I don't want to establish a precedent whereby defendants or parties in cases can get jurors disqualified by yelling or screaming at them in public. She says that is not going to affect her.

MR. ZIMAROWSKI: Your Honor, just so the record is clear, we would again move for a mistrial on the basis of manifest necessity. Second, this Court has dismissed two (2) jurors. The first juror that the Court dismissed was an individual who made similar representations that he could sit fairly and impartially when he recognized one of the defense witnesses. At that point, this Court -

It is apparent that the absence of any alternate jurors factored into the Court's decision. The Petitioner moved for a mistrial which was denied by the Trial Court.

Upon leaving the bench the Trial Court advised the juror not to disclose the contents of the conversation with other jurors. (This admonition does not appear on the record). The juror did not volunteer any further or contradictory information. However, the following additional information is relevant to this inquiry. The juror in question did

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THE COURT: I believe it was more than recognized. He ran around with him.

MR. ZIMAROWSKI: But he also stated unequivocally that he could sit fairly and impartially and decide this case, and the Court dismissed that juror.

The second juror apparently made a comment in the jury room questioning - expressing agreement with another defense witness who was a psychologist or psychiatrist who testified, and the Court dismissed that juror.

THE COURT: What's this again? She expressed what?

MR. ZIMAROWSKI: She expressed agreement with the -

THE COURT: She didn't express agreement with anything. She simply said she would not give a conviction of first degree murder. That's not an agreement with anybody.

MR. ZIMAROWSKI: Well, Your Honor, that was a witness favorable to the defense, and you dismissed that witness. We would suggest that this is a witness that is favorable to the State and you are not applying the same standards in keeping this witness, and I would move for a mistrial on the basis of manifest necessity and due process.

THE COURT: Okay. That's denied.

TR at 905-908.

disclose to the entire jury panel the convenience store incident prior to her note to the Court.[4] This matter was discussed among the jurors. Information received is the threatened juror in question was reluctant to come forward with such information; however, after discussions with fellow jurors she was encouraged to come forward and advise the Trial Court of what had occurred, upon information and belief, "in case something might happen". The juror did not volunteer this information to the Trial Court while at the bench. However, defense counsel represents that the information, upon information and belief, is an accurate description of the events prior to the bench conference and prior to closing arguments and deliberations. Significantly, the Court did not conduct any "Remmer" inquiry of the other eleven (11) jurors on the panel. See *Remmer v. U. S.*, 347 U.S. 227 (1954). In fact the prior inquiry with the juror did not satisfy *Remmer* due to incomplete and inadequate information upon which to conduct a proper inquiry.

Additional facts are also pertinent to the analysis. First, the remark is attributed to an acquaintance of the Petitioner. Second, the remark

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[4] THE COURT: Okay. The record reflect that I have discussed this matter with counsel in chambers and we - counsel and myself discussed it with the bailiff and with regard to the juror on the last day of trial that reported having heard a threat in a Go Mart or Dairy Mart, Dairy Mart, the issue was whether or not she told the other members of the jury. She - when she reported it to the baliff, she said, "I've talked to the other members of the the jury about this, and they said I should tell the Judge." So fact discuss it with other members of the jury. TR at 1041-1042.

can be construed as a threat. Third, the only way the juror could have been physically identified at an outside location is if the speaker had been present in the courtroom during the trial. Fourth, four (4) of the Petitioner's friends testified at trial and their credibility and factual presentation was at issue. And fifth, in addition to the determination of the guilt or innocence of the Petitioner, the jury was asked to determine Petitioner's future dangerousness for purposes of recommending mercy or no mercy.

The State did no followup investigation and had no interest in an apparent criminal violation of W. Va. Code 61-5-27 (crime to threaten a juror) nor did the Court act under W. Va. Code 61-5-26 (contempt proceedings). The Trial Court's concerns are addressed under these provisions but were simply ignored. See TR at 907, 1042-1045, Footnote 3 supra. Moreover, they are independent of and do not address nor protect the due process rights of the accused in such situations. Quite the contrary, the Trial Court's overriding concern can only be viewed as trial management rather than due process of law.

The clearest articulation of the standards comes from the Fourth Circuit Court of Appeals, the circuit in which West Virginia sits, in the case of *Stockton v. Virginia*, 852 F.2d 740 (4th Cir. 1988). The *Stockton* case involved jurors at a restaurant during a capital trial deliberation being contaminated by the comment from the restauranteur that "they ought to fry the son of a bitch". This case arises out of a capital murder case in the State of Virginia and was being reviewed by the Fourth Circuit Court of Appeals on a federal habeas review. The Fourth

Circuit found that the jury contamination denied petitioner his right to a fair and impartial jury during those deliberations and remanded.

The *Stockton* court articulates the standards as follows:

> "The Sixth Amendment guarantees a criminal defendant the right to a trial by an impartial jury. No right touches more the heart of fairness in a trial. The fact that there was here no threat or inducement, no invasion of the sanctity of jury room deliberations, does not still the sense that something went awry. The Supreme Court has long recognized the dangers to impartiality posed by unauthorized communications between third parties and members of the jury. Almost a century ago the Court declared that "private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict at least unless their harmlessness is made to appear." *Mattox v. United States*, 146 U.S. 140, 150, 36 L. Ed. 917, 13 S. Ct., 50 (1892). In *Remmer v. United States*, 347 U.S. 227, 98 L. Ed. 654, 74 S. Ct. 450 (1954), the Court reinforced the rule set for in *Mattox:*
>
> > In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial ... The

> presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229.

The rules of evidence make it difficult for either party to offer direct proof of the impact that an improper contact may have had on the deliberations of the jury. See Fed. R. Evid. 606(b); *Mattox*, 146 U.S. at 149 (quoting *Woodward v. Leavitt*, 107 Mass. 453 (1871) ("the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict"). The right to an impartial jury belongs to the defendant, however; thus a rebuttable presumption of prejudice attaches to the impermissible communication. While juror testimony concerning the effect of the outside communication on the minds of the jurors is inadmissible, the state may rebut the presumption of prejudice through whatever circumstantial evidence is available, including juror testimony on the facts and circumstances surrounding the extraneous communication. This circuit had held in the civil context that the party supporting the jury's verdict must overcome the rebuttable presumption of prejudice that attaches once an impermissible contact with

> the jury has been established. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986). If this was true in the civil context, it would appear no less applicable to a criminal trial."

852 F.2d at 743-744.

There is no doubt that the impermissible contact was made and a rebuttable presumption of prejudice arises. Further, the burden shifts to the State of West Virginia to prove the contact harmless beyond a reasonable doubt. Given (a) the nature of the contact; (b) the entire jury panel was contaminated and other jurors encouraged the threatened juror to come forward "in case something might happen"; (c) this same jury panel passed upon the credibility and evidence of four of the defendant's other acquaintances who testified; and, (d) in addition to determining the guilt of the Petitioner, the jury panel must determine the future dangerousness of the Petitioner, the prejudice is overwhelming and simply cannot be rebutted as harmless beyond a reasonable doubt. In fact, the State of West Virginia offered no credible rebuttal. As such, the Petitioner was denied his constitutional right to a fair and impartial jury.

REASONS FOR GRANTING THE PETITION

The West Virginia Supreme Court of Appeals has discretion to deny appellate review. However, as evident by *Youngblood* and *Flippo*, the Court has seemingly abdicated their obligation to ensure fundamental constitutional protections are followed.

Where the constitutional issues are so readily apparent and not acted upon by the West Virginia Supreme Court the U. S. Supreme Court must act. See *Youngblood*, supra. A Writ must be granted to properly ensure the interests of the fair administration of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted:

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APPENDIX A

[ENTERED: JUNE 5, 2007]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th of June, 2007, the following order was made and entered:

State of West Virginia, Plaintiff Below,
Respondent

vs.) No. 070358

Dayton Scott Lister, Defendant Below,
Petitioner

On a former day, to-wit, February 6, 2007, came the petitioner, Dayton Scott Lister, by James B. Zimarowski, his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Marion County, rendered on the 18th day of May, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondent, the State of West Virginia, by Patrick N. Wilson, Prosecuting Attorney, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justices Starcher and Albright would grant.

Justices Starcher and Albright believe the petition for appeal should be granted, because the defendant was sentenced to life imprisonment

without the possibility of parole - and this Court should hear the appeal of all such sentences, to assure that the defendant received a fair trial.

The majority, in refusing to guarantee full appellate review to all life without parole sentences, has argued that it would be unfair to carve out a special review policy for defendants sentenced to life imprisonment. However, the Court has carved out just such a policy in civil appeals where punitive damages are awarded.

> 2. Under our system for an award and review of punitive damage awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial Court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal.
>
> 5. Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial Court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

Syllabus Points 2 and 5, *Games v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991). Civil cases involving only money should certainly not receive more appellate review and due process than defendants sentenced to prison for the rest of their lives. In essence, the majority is giving "big business" defendants more rights than criminal defendants. This is wrong.

It is true that this Court and the Fourth Circuit have upheld the present system. *Id.* (citing *Billotti* v. *Dodrill*, 183 W.Va. 48, 394 S.E.2df 32 (1990), and *Billotti v. Legursky*, 975 F.2d 113 (4th Cir. 1992)). But judicial notions of due process are not frozen in time. As noted by the United States Supreme Court in *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961):

> Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

The panoply of federal constitutional rights afforded state criminal defendants today were only recognized during the last forty-one years of our 228 years as a nation. *See, e.g., Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792 (1963) (right to counsel). Even the constitutional rights to the effective assistance of counsel at trial and on appeal were not recognized until 1984 and 1985, respectively. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Evitts,* 469 U.S. 387, 105 S.Ct. 830.

That *the right to a mandatory full appeal in these cases is an integral part of every other state's criminal justice system* is convincing evidence that it is essential to ensure that adjudications of guilt are correct.

It is no historical accident that "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb* v. *United States*, 318 U.S. 332, 347, 63 S.Ct. 608, 616 (1943). Moreover, "the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake." *McGautha v. California*, 402 U.S. 183, 309, 91 S.Ct. 1454, 1519 (1971) (Brennan, J., joined by Douglas and Marshall, J.J., dissenting). Given the interests at stake here, it requires no great leap of logic or adoption of revolutionary principle to insure via full appellate review that defendants sentenced to life without parole receive fair trials, "which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068 (1965).

What of the argument that the present system "works" because relatively few life without parole cases denied review are overturned by the federal courts? There are any number of reasons why federal habeas relief is not granted, not the least of which is that the Fourth Circuit typically has the lowest reversal rates in criminal cases. *See* Marc M. Arkin, *Rethinking the Constitutional Right To A Criminal Appeal*, 39 UCLA L. Rev. 503, 514-15 (1992) (pointing out that in 1989, 9.3 percent of the direct criminal appeals decided by the federal courts of appeals resulted in reversals, with the lowest percent of reversals in the Fourth Circuit, 4.7 percent). The Fourth Circuit is also the Court that held that the police's failure to administer the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), is not a constitutional violation, *United States* v. *Dickerson*, 166 F.3d 667, 690 (4th Cir. 1999), which decision was subsequently reversed by the United States Supreme Court in an opinion by Chief Justice Rehnquist. *See Dickerson* v. *United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000).

Moreover, indigent criminal defendants are not represented by counsel in federal habeas proceedings unless an evidentiary hearing is required and must navigate a minefield of procedural and substantive hurdles to obtain federal habeas relief. As one commentator noted:

> The Supreme Court's current decisions in the area of habeas corpus, however, raise troubling questions about the ability of federal habeas corpus to act as a backstop for truncated state appellate or collateral

> review. Recent Supreme Court decisions have limited the availability of federal collateral relief to state prisoners in a number of ways. (Footnote omitted.)

Arkin, *supra*, at 511-12. Judging the adequacy of this Court's discretionary review of cases by subsequent results in the Fourth Circuit is fallacious.

West Virginia is often looked upon as being economically or otherwise disadvantaged. It is no secret many of our young people are leaving the State and our population is declining. There are, of course, many reasons why our State may not compare favorably to other states in some areas. But this is not a position State legislative or executive officials have consciously chosen for the citizens of our State. In the judicial arena, we should not choose to be dead last in the nation in providing appellate review to our citizens in life without parole cases. As we begin a new century and millennium, should we not strive to provide the *best* judicial review for our citizens in these cases? There is a choice.

In 1997, this Court appointed a thirty-eight member Commission on The Future of The West Virginia Judiciary, and one of its recommendations (5.1(h)) was that "each litigant should be guaranteed one appeal-of-right either at the Intermediate Court of Appeals or at the Supreme Court." This Court should take a leadership role in achieving that goal by granting appeals in cases involving life without parole sentences.

Additionally, we reiterate our previously-stated additional grounds for granting appeals in all life-without-possibility of parole cases:

We believe that the Court should give full appellate review, with full briefing and oral argument, to all cases involving life imprisonment without the possibility of parole, whether those cases are before us on direct appeal, or, as here, are before us on appeal from denial of habeas corpus relief where the original direct appeal was refused. Our reasons are somewhat overlapping.

First, without full state Court appellate review, such criminal convictions do not have any sort of "stamp of approval" or presumption of correctness, in any subsequent or collateral proceeding - for example, in federal or state habeas corpus. As an example, this Court recently refused to review a life-with-no-parole murder conviction. *Then, the Supreme Court of the United States reversed this Court, saying that the conviction may have violated established constitutional law, and remanded the matter for further proceedings. Flippo v. W. Va.*, 528 U.S. 11, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999). (Justice Starcher notes that he voted not to review this case, a vote of which he now repents.) The Supreme Court noted that *the last Court to rule on the merits of the case was the Circuit Court of Fayette County*. We find this rather embarrassing - to have a West Virginia trial court's errors fixed by "the U.S. Supremes" - without this Court even taking a look at the issues first. Moreover, the day may well come when the Supreme Court of the United States (or even this Court) requires full appellate review of such cases as a

matter of due process. We would support such a position. If that day comes, this Court does not want to find itself in a position of having to deal with whether such a ruling might be retroactive.

Second, merely looking at the appeal petitions in these cases means we do not get the benefit of the West Virginia Attorney General's review - as is ordinarily the case when a petition is accepted, briefed, and argued. When there is a full review, the Attorney General's office will often recognize and acknowledge clear error when it is present - although they may argue that such error was harmless. And of course, we are equally often well-instructed by the Attorney General in supporting the State's position. Simply put, Attorney General involvement means better quality briefs and argument, and improves the quality of justice.

Third, full appellate review assures that important issues in these "life-without-the-possibility-of-parole" cases are brought to the attention of the bar generally, and can be followed by interested lawyers. When cases are briefed and argued and an opinion is to be written, *amici* or other voices may ask to be heard on important issues.

Fourth, our criminal jurisprudence is better reasoned and developed when such cases are briefed and dealt with in an opinion. Where we uphold a conviction (as we do in most cases), opinion writing forces the Court to consciously recognize and articulate its reasoning. Additionally, as one of three co-equal branches of government, we have a duty to reflect on

what is going on in our Court system and our broader society, that leads to such severe criminal sentences.

Fifth, when the Court accepts life-without-the-possibility-of-parole cases for full briefing and argument, we can (in appropriate cases) appoint new counsel, so that exceptionally important issues will be properly presented. It is apparent to us that some defendants do not have their issues well raised, due to inexperienced counsel preparing their petitions. Regrettably, but inescapably, the quality of an appeal petition can make some difference as to whether or not we accept a case for full argument

Finally, we should have these cases argued and briefed because the consequences of error at trial are so extreme. In Illinois, since the reinstatement of the death penalty, as many people as have been executed have been *freed from death row*, due to trial errors. Here in West Virginia, we know all about the Fred Zain case. We know that trials *can* be unfair, and criminal convictions *can* be downright wrong. Where the sentence is one that deprives a person even of the *possibility* of parole, simple fairness means that we must take the steps that will try to detect any unfairness in the proceedings that led to the sentence.

We dissent to the majority's decision to deny the right of full appellate review to all persons give life without parole sentences.

Chief Justice Davis and Justice Maynard voted to refuse the defendant's petition. For the

reasons set forth below, Chief Justice Davis and Justice Maynard believe that the Court's discretionary review procedure in cases involving a sentence of life without the possibility of parole is constitutionally sound.

1. This Court has affirmed the constitutionality of discretionary review in cases involving life without the possibility of parole. In *Billotti* v. *Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990), the defendant argued that discretionary review of cases involving life without the possibility of parole violated state and federal due process guarantees. This Court pointed out in *Billotti* that over one hundred years ago the United States Supreme Court had held in *McKane* v. *Durston*, 153 U.S. 684, 14 S. Ct. 913, 38 L. Ed. 867 (1894), "that appellate review is not an element of due process of law, and, consequently, that there is no constitutional right to an appeal." *Billotti*, 183 W. Va. at 52, 394 S.E.2d at 36.[1] In rejecting the defendant's challenge to our discretionary review procedure, we stated in *Billotti* that "[a]n examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure

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[1] We also recognized in Syllabus point 1 of *Wingfield v. Neal*, 60 W.Va. 106, 54 S.E. 47 (1906), in part, that "[a]n appeal was unknown to the common law."

comports with the due process requirements of both the federal and state constitutions." 183 W. Va. at 53, 394 S.E.2d at 37.[2]

2. **The Fourth Circuit has affirmed the constitutionality of our discretionary review in cases involving life sentences without the possibility of parole.** In *Billotti* v. *Legursky*, 975 F.2d 113 (4th Cir. 1992),[3] the defendant argued "that due process requires an appeal as of right, with full review on the merits by the West Virginia Supreme Court of Appeals." 975 F.2d at 115. The Fourth Circuit rejected this argument and, in doing so, made the following observations:

> It is plain that West Virginia has afforded Billotti an adequate opportunity to challenge the alleged errors in his trial. The Fourteenth Amendment does not authorize the federal courts to micromanage state criminal justice systems. In our federal system, the states are allowed to structure their systems of criminal justice as they see fit, as long as their systems satisfy the basic demands of due process. There is often no one best way of doing things. . . ,

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[2] This Court observed in *State* v. *Legg*, 151 W.Va. 401, 404-05, 151 S.E.2d 215, 218 (1966), "[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error."

[3] This case and *Billotti* v. *Dodrill*, which was discussed previously, involved the same defendant.

> Indeed, petitioner has not explained exactly how an appeal as of right would have increased the accuracy of the determination that he received. In many jurisdictions, appeal as of right is conducted without oral argument, with screening by staff attorneys, or with limited briefing. We cannot see how such streamlined systems deliver a more meaningful opportunity to be heard than does West Virginia's system of discretionary appeals. West Virginia allowed Billotti to communicate his claims of legal error to the reviewing tribunal, accompanied by a record of the proceedings below necessary to evaluate his arguments. We believe that due process requires no more.

975 F.2d at 116-17 (internal citations omitted).[4]

3. It would be unfair to carve out a special review policy. Assuming, for the sake of argument, that this Court could carve out a special review policy for defendants sentenced to life without the possibility of parole, we believe such a policy would unfairly discriminate against all other litigants seeking an appeal to this Court. Every litigant petitioning for appeal believes that his or her case has merit and should be heard. Why should this Court have a policy of reviewing all cases involving life without the possibility of parole, but deny such treatment in termination of parental rights cases,

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[4] *See also Foster v. Hedrick*, 856 F.2d 186 (4th Cir. 1988) (unpublished table decision), *text reported at* 1988 WL 86674 (finding no due process violation in denial of petition for appeal in case involving life without possibility of parole).

child abuse and neglect cases, cases where million dollar verdicts have been awarded, or wrongful death cases where no liability was found?[5]

4. Our system of discretionary review works. Our system of discretionary review of cases involving a sentence of life without the possibility of parole works. Proof of this fact is found in the number of such cases overturned by federal courts. In our review of petitions filed to the United States Supreme Court by State criminal defendants, I found only one case involving a sentence of life without the possibility of parole where the Supreme Court disturbed this Court's disposition denying full appellate review. The case was *Flippo* v. *West Virginia*, 528 U.S. 11, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999). In reviewing opinions of the Fourth Circuit Court of Appeals, we did not discover any case where habeas relief was granted to a State defendant who had been sentenced to life without the possibility of parole and was denied full review by this Court.

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[5] In their dissenting comments, Chief Justice Albright and Justice Starcher have stated that this Court grants automatic review to cases involving punitive damages. To support this spurious statement they have cited to Syllabus points 2 and 5 of *Games v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). As members of this Court, Chief Justice Albright and Justice Starcher know full well that this Court has never interpreted *Games* as requiring acceptance of petitions for appeal in all punitive damages awards cases. Punitive damages cases are treated the same as all cases presented to this Court. Petitions for appeal that have merit are granted, and those without merit are denied. We made this point clear in Syllabus point 2 of *Games* when we held that this Court will provide "a meaningful and adequate appellate review, *which may occur when an application is made for an appeal.*" (Emphasis added).

Finally, in our review of federal district Court published decisions, we found only two cases where habeas relief was granted to defendants, who had been sentenced to life in prison, after we denied full review.[6] We believe this Court's record in federal courts speaks well of the integrity and thoroughness of our system of discretionary review of cases involving life without the possibility of parole.

5. A majority of states provide for discretionary review by their highest courts. In their dissenting comments, Chief Justice Albright and Justice Starcher have indicated that "West Virginia is now the only state that does not guarantee a full appellate review to persons sentenced to life imprisonment without parole." This statement is grossly misleading. In our review of state statutes and Court rules, we found that only in a minority of states does the Court of last resort grant an appeal of

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[6] *See Kinder* v. *Boles*, 253 F. Supp. 817 (N.D. W. Va. 1966); *Holland* v. *Boles*, 225 F. Supp. 863 (N.D. W. Va. 1963). Neither case indicated whether the defendants were eligible for parole. The *Holland* defendant was subsequently retried and convicted of first degree murder. *See State v. Holland*, 149 W. Va. 731, 143 S.E.2d 148 (1965).

right in criminal cases.[7] The majority of the states' highest courts provide for only discretionary review of criminal convictions, except for cases involving a sentence of death.[8] In two states, Oklahoma[9] and Texas,[10] the highest Court cannot hear any criminal appeal-those states have special criminal

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[7] *See generally* Ark.R.S.Ct., Rule 1-2 (2004); Con. Gen. Stat. Ann. § 51-198 (Supp. West 2004); Del. Code Ann. tit. 10, § 142 (Michie 1999); Ga. Code Ann. § 5-6-34 (Supp. Lexis 2004); Idaho App. R., Rule 11 (2004); Ind. R. App. P., Rule 4 (2005); Kan. Stat. Ann. § 22-3601 (1995); Ky. R. Crim. P., Rule 12.02 (2005); Md. Code Ann., Cts. & Jud. Pro. § 12-301 (Lexis 2002); Minn. R. Crim. P., Rule 29.02 (2004); Mont. Code Ann. § 46-20-104 (Edwards 2003); Neb. Rev. Stat. § 29-2521.02 (1995); Nev. Rev. Stat. § 177.015 (2003); N.M.R. App. P., Rule 12-102 (2005); N.D. Cent. Code § 29-28-03 (Michie 1991); R.I. Gen. Laws § 12-19.2-5 (Lexis 2002); S.D. Codified Laws tit. 8B, § 23A-32-2 (Michie 1998); Utah Code Ann. § 78-2-2 (Lexis 2002); Vt. R. App. P., Rule 3 (2004); Wyo. Stat. Ann. § 7-12-101 (Lexis 2003).

[8] *See generally* Ala. S. Ct. R., Rule 39(a) (1996); Alaska Stat. § 22.05.010 (Lexis 2000); Ariz. Rev. Stat. Ann. § 12-120.24 (West 2003) & Ariz. R. Crim. P., Rule 31.19 (2005); Cal. Ct. R., Rule 28 (Supp. West 2005); Colo. App. R., Rule 49 (2002); Fla. R. App. P., Rule 9.030(a) (2004); Haw. Rev. Stat. §§ 602-5 & 602-59 (1993); Ill. S. Ct. R. Crim. App., Rules 315, 603, 612(b) (2004); Iowa R. App. P., Rules 6.401 & 6.402 (2005); La. Code Crim. P., Art. 912.1 (Supp. West 2004); Mass. Gen. Laws Ann. ch. 211A, § 11 (West 1989); Mich. App. R., Rule 7.203 (2004); Miss. R. App. P., Rules 16 & 17 (2001); Mo. R. Crim. P., Rule 30.01 (2004); N.H. S. Ct. R., Rule 7 (2003); NJ.R. Gov. App. P., Rule 2:2-1 (2005); N.Y. Crim. Pro. Law § 450.90 (Supp. West 2003); N.C. Gen. Stat. § 7A-31 (Lexis 2003); Ohio Rev. Code Ann. § 2953.02 (Anderson 2003); Or. Rev. Stat. tit. 1, § 2.520 (2003); Pa. Stat. Ann. tit. 42, § 724 (West 2004); S.C. Code Ann. § 14-8-210 (Supp. Law. Co-op. 2004); Tenn. R. App. P., Rule 11 (2004); Wis. S. Ct. I.O.P., I.O.P. II (2005).

[9] *See* Okla. Const. Art. 7, § 4 (West 1981).

[10] *See* Tex. Gov. Code Ann. § 22.001(West 2004).

appeal courts.[11] Further, noncapital punishment criminal appeals to the Texas Court of Criminal Appeals is purely discretionary with that Court. Additionally, the state of Maine has a unique appellate system in that the highest Court is required to review a criminal conviction,[12] but has discretion to refuse a petition appealing a criminal sentence.

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Attest: /s/_____
Clerk, Supreme Court of Appeals

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[11] *See* Okla. Crim. P., § 1051 (2005); Tex. R. App. P., Rule 66.2 (2004).

[12] See, Me. Rev. Stat. Ann. tit. 14, § 2115 (West 2003). *See* Me. R. App. P., Rule 20 (2004).